Office-Supreme Court, U.S.
FILED
OCT 4 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 512

JOSEPH A. ADELMAN and JOSEPH W. KENNEALY, individually and as representative of all persons in Dakota County, Minnesota owning land in the Lower Minnesota River Watershed District,

Appellants,

vs.

THE LOWER MINNESOTA RIVER WATERSHED DISTRICT,

Appellee.

APPELLANTS' REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

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Statement

Appellee in its statement makes considerable reference to the notices given by the Watershed District of its various proceedings. Any facts relating to notices given or received are wholly immaterial to the basic question as to this Court's

jurisdiction and the issues to be determined on this appeal. Also we point out that two of the land owners who were involved as plaintiffs in this action testified at the trial that they received no *actual* notice of any hearings and there was no proof of service of any notice on them. (R. p. 271, f. 1 - Exhibits 4, 5, 6, 7 and 32) (R. p. 213, f. 2 - p. 215, ff. 1, 2 - Exhibits 4, 5, 6, 7 and 32). Therefore, these two land owners who are plaintiffs are in a position to raise the constitutional questions herein irrespective of any notices given or received by any other plaintiffs. The immateriality of the notice question is further elaborated upon later in this reply.

We call to this Court's attention that the decision and memorandum attached to appellee's Motion to dismiss (page 34 et. ff.) as appendix "B" is a decision on a temporary restraining order only and is in no way involved in this case. The said decision and memorandum (dated November 1, 1963) so attached was, in fact, vacated and withdrawn by the trial judge and a new decision substituted dated November 26, 1963, without any memorandum. (See Exhibit 94 on file with this Court.) The November 1, 1963 opinion is also printed on page 435 of the Record in the Minnesota Supreme Court. That appellee's actions in this regard were wholly unjustified is made more apparent by the fact that that case involved different parties, different issues, different attorneys and is, in fact, still pending in the trial court. Therefore, any such decision is fully immaterial and irrelevant as to any of the issues in this case.

It is also to be noted, lest there be any confusion, that in the last full paragraph on page 5 of Appellee's Motion the date is incorrectly stated to be October 10, 1962. Appellant respectfully believes that such date should be October 10, 1963.

Jurisdiction

Appellee states that appellants failed to attach to its jurisdictional statement the opinion of the Minnesota Supreme Court and also failed to set out in full the Statute involved. Appellant interpreted said rules to mean that said opinion need not be attached to the jurisdictional statement if it had been reported. Said opinion had been reported at the time the jurisdictional statement was prepared and the correct citation thereof was duly included in the jurisdictional statement. In any event, appellee has seen fit to attach a full and complete copy of the opinion of the Minnesota Supreme Court to its motion; and, therefore, this objection should be moot. Rule 15 1(b) (V) requires only that the pertinent text of a lengthy statute need be set out in a jurisdictional statement. This was done. However, since appellee has set the statute out in full, this objection should likewise be moot.

The Judgment Appealed From Does Not Rest on an Independent or Adequate Non-Federal Basis and, in Any Event, Is Without Any Fair or Substantial Support

Appellees state that the appeal should be dismissed because the judgment appealed from "rests on an adequate Non-Federal basis" because the Minnesota Supreme Court reversed the Dakota County District Court upon the grounds that appellants had an adequate legal remedy.

We first note that appellee does not contend that the alleged Non-Federal basis of the decision was "independent" as well as adequate as is required. Appellant respectfully submits that the alleged Non-Federal basis of the decision relied

upon by the appellee is neither independent nor adequate and is without fair or substantial support. The basic test of the Non-Federal basis rule is whether or not the decision appealed from could remain the same if this Court would hold in favor of appellant on the Federal Constitution issue. *Herb v. Pitcairn*, 324 U.S. 117 (1944). We submit that the decision of the Minnesota Supreme Court could, in no event, be the same if the Federal Due Process issue is decided in favor of appellant. If it is held that the Watershed District does not have the Federal Constitutional power to levy special assessments on abutting or non-abutting land for a project *solely* to improve navigation, such a holding would necessarily be final and decisive and render unnecessary an inquiry into any other issues. The simple effect of such a holding would be that the project could proceed if the Watershed District or Federal Government could find proper sources of money other than the unconstitutional special assessment on plaintiffs' abutting and non-abutting property. See *Norton v. Shelby County*, 118 U.S. 425 (1886); *City of Saint Paul v. Dalsin*, 71 N.W. 2d 855; *State v. One Oldsmobile Two-Door Sedan*, 35 N.W. 2d 525; *Risty v. Chicago, R. I. & Pac. Ry. Co.*, 270 U.S. 378 (1925).

Furthermore, appellants in this case are threatened with serious and immediate injury by the taking of their property without due process of law; if appellee would have its way, appellants would be deprived of their right to contest this Federal Constitutional question. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938). So far as the jurisdiction of this Court is concerned, the plaintiffs here would be in the same position as the plaintiff in the case of *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), had jurisdiction been there denied; see also *Brinkerhoff-Faris Trust and Savings*

Co. v. Hill, 281 U.S. 673 (1930); *Williams v. Georgia*, 349 U.S. 375 (1955); *Stout v. City of Baxley*, 355 U.S. 313 (1958); *Ancient Egyptian Order v. Michaux*, 279 U.S. 737 (1929); *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940); *Ward v. Love County*, 253 U.S. 17; 64 L. ed. 751; 4 U.S. Ct. 419 (1920).

Appellee points to the fact that some plaintiffs did receive actual notice of the various hearings held by the Watershed District for the establishment of the project and the approval of the appraisers' report and that a few plaintiffs did, in fact, appeal from the assessment levy to the District Court of Dakota County, which appeals are still pending. However, we call to the attention of this Court that the final hearing on the appraisers' report for the levying of the special assessments was the only hearing for which the Watershed Act required mailed notice. All prior decisions of the Watershed District for the approval of the project or even the creation of the District were made either on no notice to the land owners or by published notice only. The record is also uncontroverted that at least two land owners who testified received no actual notice of any hearing, supra. The fact that a few land owners who were plaintiffs did appeal from the order levying the assessment is of no importance and, in any event, the right to such appeal is inadequate because M.S.A. 112.80 states that said appeals may only be made from an order of the Managers determining any of the following matters:

"1. The amount of benefits determined.
2. The amount of damages allowed.
3. Relative to the allowance of fees or expenses in any proceeding; or
4. Which affects a substantial right."

Since the final assessment order determined solely the amount of benefits, only the question as to the amount of the assessment could be raised on such appeal.

The Minnesota Supreme Court in a case decided shortly prior to the instant case clearly held that injunction was a proper remedy in special assessment cases, if the land owner acted at least before the work was completed. See *Larson v. Freeborne County*, 126 N.W. 2d 771 (1964). In the instant case *no* work on the assessment project had been commenced prior to the commencement of this action and no contract therefore had even been made or entered into. It is clear that injunction was not only the proper remedy in this case, but the only one which could afford adequate relief. Had appellants taken any other course, including the one provided in M.S.A. 278.01, there not only was serious doubt whether the constitutional question could be raised, but a multiplicity of suits could not have been avoided and undoubtedly the question would not have been decided before any work was commenced and large sums of money expended. The injunction remedy also has been held by this Court to be proper under circumstances almost identical to those in the instant case not only because the legal remedies are inadequate, but also to avoid multiplicity of suits (which factor is also present in the instant case). See *Risty v. Chicago, R. I. & Pac. Ry. Co.*, 270 U.S. 378 (1925), 70 L. ed. 642. Thus, it is submitted that the alleged Non-Federal basis relied on by appellee is neither independent or adequte and is without fair or substantial support.

A Substantial Question Is Involved

In its discussion on this point, appellee wholly failed to answer appellant's contention that a substantial federal question is involved. Appellee does not deny that the question involved on this appeal is one which has not been decided by this Court or any other Federal Court and is of the greatest importance for land owners on all navigable rivers in the United States as well as to all taxing districts on such navigable rivers.

State's Jurisdiction Over the Minnesota River

Appellee states that appellants' argument that the State of Minnesota has no power (the delegation of this power is immaterial) to levy special assessments against abutting and non-abutting land owners for a project, the sole purpose of which is to improve a navigable river for commercial purposes, can not be the basis of review by this Court—apparently, for the reason that Minnesota has concurrent jurisdiction over the Minnesota River.

Appellant points out that its argument in the jurisdictional statement herein *assumed* that Minnesota might have concurrent jurisdiction over navigable rivers within its borders.[1]

Besides other reasons given in the jurisdictional statement, the essential point in this connection is that neither the State of Minnesota or the Lower Minnesota Watershed

[1] The Minnesota River is admittedly navigable, even though its source and mouth lie entirely within the State, its waters flow into the Mississippi River and on to the Gulf of Mexico.

District has *exclusive* jurisdiction or control over the river so as to enable either of them to levy special assessments for the improvement here involved, when they can not fully control the use of that improvement.

Conclusion

Appellants respectfully submit that appellee's motion to dismiss or affirm should be denied and that jurisdiction of this appeal should be noted.

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